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9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 CHRISTIAN COX, a married man;
12 PACIFIC COAST FIBER FUELS,
13 LLC, a Washington limited liability
14 company; and JOSEPH A. MAYO IV,
15 a married man,

16 Plaintiff,

17 vs.

18 ALLIANT INSURANCE SERVICES,
19 INC., d/b/a MOLONEY + O'NEILL,
20 a Delaware corporation; DAN
21 ROMAIN and JANE DOE ROMAIN,
22 a marital community; FARMIN
23 ROTHROCK & PARROTT, INC., a
24 Washington corporation; and KELLY
25 EGAN and JANE DOE EGAN, a
marital community,

Defendants.

Case No.: 2:16-cv-00362-SAB

**PLAINTIFFS' MOTION TO
DISQUALIFY DEFENDANTS'
COUNSEL**

Date: December 15, 2016

Time: 1:30pm

ORAL ARGUMENT REQUESTED

I. MOTION

Plaintiffs Christian Cox, Pacific Coast Fiber Fuels, LLC, and Joseph A. Mayo IV, by and through their attorneys of record, ROBERTS | FREEBOURN, PLLC,

1 move this Court for an order disqualifying Defendants' lawyers, Roberts A. Dunn,
2 Alexandria T. Drake, Richard Wetmore, and the law firm of Dunn & Black, P.S.
3 and directing that each be immediately withdrawn from this case. This motion is
4 based upon RPC 1.7, RPC 1.9, RPC 1.10, RPC 1.16, the declaration of Kevin W.
5 Roberts, the Declaration of Christian R. Cox, the Declaration of Joseph A. Mayo
6 IV, and the discussion below.
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8 **II. RELEVANT FACTS**

9 **A. DUNN & BLACK, P.S. (FORMERLY KNOWN AS DUNN, BLACK, 10 AND ROBERTS, P.S.)**

11 1. Kevin Roberts worked as an attorney associated with the firm now
12 known as Dunn & Black, PS from 1999 until October, 2015. **Dec. of Roberts, ¶2.**
13 At the time he decided to leave the firm and start his own firm, Roberts was a named
14 shareholder in Dunn, Black & Roberts, P.S. **Dec. of Roberts, ¶2.**
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16 2. The lawyers of the law firm of Dunn & Black, P.S. and specifically
17 Robert A. Dunn, Kevin Roberts, and Alexandria T. Drake have represented
18 Christian Cox, Pacific Coast Fiber Fuels, and Joseph Mayo. **Dec. of Roberts ¶3.**
19 Mr. Mayo and his companies were clients of Dunn & Black, PS for more than a
20 decade, and Pacific Coast Fiber Fuels still considers itself a client of Dunn and
21 Black. **Dec. of Mayo.** The representation of the Plaintiffs by Dunn & Black, P.S.
22 and the confidential information it received from Plaintiffs is substantially related
23 to this matter. **Dec. of Mayo; Dec. of Cox; and Dec. of Roberts.**
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1 3. Dunn & Black, P.S. was and is a small firm. The attorneys in the firm
2 constantly discuss among themselves on-going cases, clients, and work being
3 performed. In addition, the office is designed with open workstations for paralegals
4 assigned to multiple attorneys. The workstations contain a counter on which
5 paralegals and attorneys often leave confidential client information and work
6 product. During the time Kevin Roberts was an attorney at the firm, it was common
7 for attorneys Alexandria Drake and Richard Wetmore to read information, work
8 product, and confidential client communications even on matters that they were not
9 assigned to work on. This included reviewing and discussing issues relating to the
10 representation of Christian Cox, Pacific Coast Fiber Fuels, and Joseph Mayo. **Dec.**
11 **of Roberts, ¶4.**

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14 4. During the time Kevin Roberts was an attorney at Dunn & Black, PS
15 (formerly known as Dunn, Black & Roberts, PS), he and Robert A. Dunn had a
16 close working and social relationship. As it related to employment cases or clients,
17 Kevin Roberts and Robert A. Dunn would discuss on almost a daily basis client
18 issues, confidential client information and work together to brainstorm ideas for
19 approaching those issues. This was especially true of work and confidences that
20 Kevin Roberts, Roberts A. Dunn and others in the firm performed on behalf of
21 Christian Cox, Pacific Coast Fiber Fuels and Joseph Mayo. **Dec. of Roberts, ¶5.**
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B. CHRIS COX

5. Chris Cox is a licensed attorney who worked for Dunn & Black, PS from 2003 – 2006. In 2006, Christian Cox left Dunn & Black and went to work for Moloney, O’Neill, Corkery & Jones, Inc. as an insurance agent. **Dec. of Cox, ¶9.**

6. Moloney, O’Neill, Corkery & Jones, Inc. (“MOCJ”) is a Washington corporation that was formed on September 11, 1967.

7. Plaintiff Christian Cox was an employee and Shareholder of Moloney, O’Neill, Corkery & Jones, Inc. (“MOCJ”) prior to September 1, 2014. **Dec. of Cox, ¶3.**

8. MOCJ and Alliant Insurance Services, Inc. (“Alliant”) entered into negotiations in 2013 in which Alliant negotiated to purchase certain assets of MOCJ.

9. During the adversarial negotiations between Alliant and MOCJ, Alliant, through their own Counsel, drafted a proposed employment agreement that would be an Exhibit to the parties Purchase and Sale Agreement. In addition to purchasing some of the assets, Alliant had agreed to hire certain employees of MOCJ. The negotiations between MOCJ and Alliant included negotiating the terms of the Exhibits to be attached to the sale documents. Neither Dunn & Black or any of its attorneys drafted the proposed employment agreement for Alliant or represented Alliant in any way. Instead, Dunn & Black and its attorneys represented

1 MOCJ and Christian Cox as adversaries to Alliant in the negotiation. **Dec. of Cox,**
2 **¶4; Dec of Roberts, ¶7.**

3 10. In his position with MOCJ, Christian Cox was provided a copy of the
4 proposed Employment Agreement that he would be required to sign if he decided
5 to accept employment with Alliant. The Proposed Employment Agreement
6 contained numerous terms and conditions, including restrictive covenants. Section
7 12(g) of the Employment Agreement contains the following provision:
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9 *Executive acknowledges that he has had an opportunity*
10 *to review and revise the Agreement and have it reviewed*
11 *by legal counsel, if desired, and, therefore the normal*
12 *rule of construction to the effect that any ambiguities are*
13 *to be resolved against the drafting party shall not be*
14 *employed in the interpretation of this Agreement.*

15 **ECF Doc. 13-2, p. 23**

16 11. To protect his own interests and in light of Alliant's statement that he
17 should seek independent counsel, Cox engaged Kevin Roberts, an attorney and
18 principal at the law firm of Dunn & Black, in approximately July/August 2014 to
19 review the proposed Alliant Employment Agreement on his behalf and to provide
20 him with legal advice relating to it. **Dec. of Cox, ¶4.** Roberts agreed to review the
21 Employment Agreement that was proposed by Alliant and to provide legal advice
22 to Cox as an individual. Based on their longstanding business and social
23 relationship, Roberts indicated that he was not going to charge Cox for reviewing
24 the employment agreement and providing advice. **See Dec. of Roberts.**
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1 12. The Alliant Employment Agreement was drafted by Alliant, and Cox
2 wanted an attorney to review the Employment Agreement on his behalf to ensure
3 that his interests were represented as well. Roberts and Dunn & Black agreed to
4 review the proposed Employment Agreement for Cox and provided
5 recommendations, including recommendations on the restrictive covenants in the
6 Agreement. **Dec. of Cox, ¶5; Dec. of Roberts, ¶7.**

8 13. After reviewing the Employment Agreement for Cox, Roberts
9 discussed the proposed Employment Agreement with attorney Robert A. Dunn of
10 Dunn & Black, and Roberts' recommendations to Cox were based in part on his
11 discussions with Dunn. **Dec. of Roberts, ¶6.**

13 14. After discussing the proposed Employment Agreement with Roberts,
14 including Roberts' concerns with the restrictive covenants therein, Cox signed the
15 proposed Alliant Employment Agreement on or about September 1, 2014. **Dec. of**
16 **Cox, ¶6.**

18 15. The proposed Alliant Employment Agreement that Roberts and Dunn
19 & Black reviewed for Cox is the subject of this litigation in that Cox alleges Alliant
20 breached that Employment Agreement. **Dec. of Cox, ¶7.**

22 16. Cox believes that there is a conflict of interest and does not consent to
23 Dunn & Black's representation of Defendants in this action and requested that Dunn
24 & Black withdrawal. To date, no response was provided by Dunn & Black.
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1 **C. PACIFIC COAST FIBER FUELS / JOSEPH MAYO IV**

2 17. Plaintiff Joseph A. Mayo IV (“Mayo”) is the majority owner of
3 Plaintiff Pacific Coast Fiber Fuels, LLC (“Pacific Coast Fiber”). **Dec. of Mayo.** He
4 is also a long-time client of Robert Dunn and the law firm of Dunn & Black, PS.
5 Id. Over the last decade, Robert Dunn and the law firm of Dunn & Black, PS have
6 represented Mayo and companies owed by him on every facet of his operations.
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8 **Dec. of Mayo.**

9 18. When Joe Mayo started Pacific Coast Fiber, he hired the law firm of
10 Dunn & Black to be its corporate counsel. **Dec. of Mayo.**

11 19. Pacific Coast Fiber and Mayo worked closely with Dunn & Black and
12 disclosed private and confidential information to Dunn & Black. **Dec. of Mayo.**
13 Mayo specifically discussed and disclosed confidential information that
14 substantially related to this action, including confidential information that relates to
15 damages in this case. **Dec. of Mayo; Dec. of Roberts.**

16 20. Pacific Coast Fiber never received notice from Dunn & Black that it
17 was terminating its representation of Pacific Coast Fiber, and Pacific Coast Fiber
18 considers Dunn & Black to be its attorneys on an ongoing basis. **Dec. of Mayo.**

19 21. Mayo also hired Dunn & Black to represent him and his wife in a
20 personal injury lawsuit against Mutual of Enumclaw in September, 2013. That
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1 litigation is ongoing, and Dunn & Black, including both Alex Drake and Robert
2 Dunn represented the Mayos through April 2016 in that litigation. **Dec. of Mayo.**

3 22. In that litigation, The Mayos disclosed private and confidential
4 information to Dunn & Black, including extensive medical records, tax returns, and
5 other sensitive information during the course of the litigation against Mutual of
6 Enumclaw. **Dec. of Mayo.** The confidential information that was provided to Dunn
7 & Black includes information not only in these confidential documents, but also
8 information relating to Mayo's financial practices which could be used against him
9 in this litigation by his current/former lawyers. **Dec. of Mayo.**
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12 23. Mayo is the majority owner of HCOW Consulting, LLC ("HCOW").
13 HCOW hired Dunn & Black to represent it in a class action litigation and paid Dunn
14 & Black over \$280,000 in legal fees. HCOW and Mayo worked closely with Dunn
15 & Black in this litigation and disclosed private and confidential information to Dunn
16 & Black, P.S. **Dec. of Mayo.**
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18 24. In addition to Pacific Coast Fiber Fuels, Mayo's other businesses using
19 Dunn & Black as their legal counsel include, Inland Fleet Services, Mayken
20 Spokane, and Mayken Investments. Each of these also disclosed private and
21 confidential information to Dunn & Black, including information about how Mayo
22 operates the businesses and who he used for services. Mayo still considers Dunn &
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1 Black to be his attorneys and part of his legal team for Pacific Coast Fiber and other
2 companies. **Dec. of Mayo.**

3 25. Because Mayo considers Robert Dunn and Dunn & Black to be
4 members of his legal team, Mayo continues to speak with Dunn confidentially about
5 his businesses, how those businesses operate, and his strategy in dealing with others.
6 All of the confidential information that Robert Dunn and his firm has obtained
7 relative to Mayo and his businesses over the past decade will relate to the claims
8 being brought in this action since they relate to the interference suffered, how Mayo
9 handles litigation and his damages. It would be prejudicial if Dunn & Black were
10 allowed to use Mayo's confidences in a proceeding adverse to him. **Dec. of Mayo.**

13 26. Robert A. Dunn, a principal of Dunn & Black, lives in the house next
14 to Mayo. Mr. Dunn and Mayo occasionally meet at their respective houses. Dunn
15 and Mayo have a social relationship and are friends. Because Mayo considers Mr.
16 Dunn and Dunn & Black to be his attorneys personally and for his business
17 ventures, he routinely discusses confidential, privileged, and strategic information
18 with Mr. Dunn during these visits with the expectation that this information is
19 privileged. Although some of these conversations may have occurred in a social
20 setting, Mayo nonetheless believed they were privileged because of their
21 longstanding legal relationship. These confidential disclosures have been far
22 reaching and the type of information Mayo disclosed about his operations and
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1 practices will be directly at issue in this action since it involves market manipulation
2 by the Defendants, tortious interference in his business relationships, CPA claims
3 and the damages resulting from each. Because of their relationship, Robert Dunn
4 has intimate knowledge on how Mayo thinks and how he deals with these types of
5 disputes. That information has been provided in confidence because of their legal
6 relationship. **Dec. of Mayo.**

8 27. Mayo was not asked by Dunn & Black for his consent allowing them
9 to represent Defendants adverse to him and does not provide that consent. Mayo
10 asks that the Court not allow lawyers that he has provided information to in
11 complete confidentiality to now represent Companies and Individuals adverse to
12 him where his confidences could be used against him and his company. The
13 representation by Dunn & Black relative to Mayo and his companies has been broad
14 and far reaching. The information Robert Dunn and Dunn & Black have
15 substantially relates to issues that will arise in this matter and should not be allowed.

18 **III. DISCUSSION**

19 The District Court is authorized to determine whether an attorney's
20 representation of a party presents a conflict of interest. Gas-A-Tron of Arizona v.
21 Union Oil Co. of California, 534 F.2d 1322, 1324 (9th Cir.1976) (per curiam)
22 (citing Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3rd Cir.1972), *cert.*
23 *denied*, 411 U.S. 986, 93 S.Ct. 2271, 36 L.Ed.2d 964 (1973)), *cert. denied*, 429 U.S.
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1 861, 97 S.Ct. 164, 50 L.Ed.2d 139 (1976). The Court refers to the local rules
2 regulating the conduct of members of its bar to determine if a conflict exists.
3 Oxford Systems, Inc. v. Cellpro, Inc., 45 F.Supp.2d 1055, 1059 (W.D. WA 1999),
4 *citing* United States ex rel. Lord Elec. Co., Inc. v. Titan Pacific Const. Corp., 637
5 F.Supp. 1556, 1560 (W.D.Wash.1986).
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7 Washington Rules of Professional Conduct (RPC) 1.7, provides that a lawyer
8 cannot represent a client with interests directly adverse to the interests of another
9 client. A lawyer is also precluded from representing another person in the same or
10 substantially related matter in which that person's interests are materially adverse
11 to the interests of the former client. RPC 1.9. An attorney is required to withdraw
12 from representing a client when representation violates the Rules of Professional
13 Conduct. RPC 1.16(1)(a).
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16 As set forth above, Dunn & Black represented Cox in adversarial negotiations
17 with Defendant Alliant in relation to the Alliant Employment Agreement that is the
18 subject of this litigation. Dunn & Black also represented Plaintiff Joseph Mayo IV
19 through April 2016 and obtained confidential information from Mayo that
20 substantially relates to this action. Finally, Dunn & Black has represented and
21 currently represents Pacific Coast Fiber and Mayo, and RPC 1.7 precludes Dunn &
22 Black from representing Defendants against them in this action.
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1 **A. Dunn & Black is Barred From Representing Defendants Against Its**
2 **Former Client Plaintiff Christian Cox**

3 Rules of Professional Conduct 1.9 governs conflicts of interest and states in
4 pertinent part as follows:

5 *A lawyer who has formerly represented a client in a matter shall not*
6 *thereafter represent another person in the same or substantially related matter in*
7 *which that person's interests are materially adverse to the interests of the former*
8 *client....*

9 *"The essence of the attorney/client relationship is whether the attorney's*
10 *advice or assistance is sought and received on legal matters."* Bohn v. Cody, 119
11 Wn.2d 357, 363, 832 P.2d 71 (1992). An attorney-client relationship does not need
12 to be formalized in a written agreement, but rather can be implied from the parties'
13 conduct. Id., *citing* In re McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983).
14 An attorney-client relationship can exist whether or not fees are paid. McGlothlen,
15 99 Wn.2d at 522, 663 P.2d 1330. The existence of an attorney-client relationship
16 *"turns largely on the client's subjective belief that it exists."* Oxford Systems, 45
17 F.Supp.2d at 1059, *citing* Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992)
18 (quoting In re McGlothlen, 99 Wash.2d 515, 522, 663 P.2d 1330 (1983))(emphasis
19 added).
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22 Dunn & Black represented Plaintiff Christian Cox in 2014 by reviewing and
23 providing counsel to Cox on the proposed Alliant Employment Agreement that is
24 the subject of this litigation. **Dec. of Cox; Dec. of Roberts, ¶7.** Kevin Roberts,
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1 who was at that time a Principal and Shareholder of Dunn & Black, reviewed the
2 Alliant Employment Agreement, discussed Cox's employment agreement with
3 Robert Dunn, and provided specific counsel to Cox on the restrictive covenants in
4 that Employment Agreement. **Dec. of Roberts, ¶7.** Cox believed that Dunn &
5 Black were his attorneys and disclosed confidential information to them. **Dec. of**
6 **Cox.**

8 This action includes allegations that Alliant breached the Employment
9 Agreement reviewed by Dunn & Black on behalf of Cox, and thus Dunn & Black
10 is representing Defendants "*in the same or substantially related matter*" in which
11 Defendants' interests are materially adverse to Cox, it's former client. *See* RPC 1.9.
12 Defendants admit that the Alliant Employment Agreement is "*absolutely central to*
13 *the entire litigation....*" ECF 11, p. 3. Thus, Dunn & Black should never have taken
14 this representation. RPC 1.16(1)(a). Since they refused to withdraw, the Court
15 should disqualify Dunn & Black from representing Defendants in this action.
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18 **B. DUNN & BLACK IS BARRED FROM REPRESENTING**
19 **DEFENDANTS AGAINST ITS CLIENTS, PLAINTIFF PACIFIC**
20 **COAST FIBER AND MAYO.**

21 **1. Pacific Coast Fiber and Mayo are Dunn & Black's Current Client**

22 A lawyer cannot represent a client with interests directly adverse to the
23 interests of another client unless each client consents in writing after full disclosure.
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25 RPC 1.7. Whether a party is a current client may be inferred from the parties'

1 conduct. Oxford Systems, Inc. v. Cellpro, Inc., 45 F.Supp.2d 1055, 1059 (W.D.
2 WA 1999), *citing* Teja v. Saran, 68 Wn. App. 793, 795, 846 P.2d 1375 (1993),
3 *review denied*, 122 Wn.2d 1008, 859 P.2d 604 (1993). The existence of an attorney-
4 client relationship “turns largely on the client's subjective belief that it exists.”
5 Oxford Systems, 45 F.Supp.2d at 1059, *citing* Bohn v. Cody, 119 Wn.2d 357, 363,
6 832 P.2d 71 (1992) (quoting In re McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330
7 (1983)). A party’s subjective belief that an attorney-client relationship exists
8 controls the issue when that belief is reasonably formed based on the attending
9 circumstances, including the attorney's words or actions. Oxford Systems, 45
10 F.Supp.2d at 1059.

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13 Plaintiffs Pacific Coast Fiber and Mayo reasonably believe that they are
14 current clients of Dunn & Black. Dunn & Black has represented Mayo and his
15 companies on a variety of issues for at least ten years until this action was filed.
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17 **Dec. of Mayo.** During that time, Mayo and his Companies have paid Dunn & Black
18 substantial sums in attorney fees and costs. **Dec. of Mayo.** Dunn & Black also
19 represented Mayo and his wife personally in litigation through April 2016. **Dec. of**
20 **Mayo.** Dunn & Black represented four other businesses controlled by Mayo. **Dec.**
21 **of Mayo.** Mayo and Dunn meet at their respective houses to discuss strategic,
22 confidential, and privileged information, and Mayo assumed that these discussions
23 were privileged and confidential since he believes Robert Dunn and Dunn & Black
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1 are his attorneys. **Dec. of Mayo.** Based on these facts, Pacific Coast Fiber and
2 Mayo have a reasonable belief that they are current clients of Dunn & Black.
3 Therefore, Dunn & Black cannot represent Defendants against Pacific Coast Fiber
4 and Mayo in this action. *See* RPF 1.7.

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6 **2. Pacific Coast Fiber and Mayo are also Dunn & Black's Former Clients.**

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8 RPC 1.9 precludes a lawyer from representing a former client "in the same
9 or substantially related matter in which that person's interests are materially adverse
10 to the interests of the former client...." Matters are "substantially related" if there
11 is a substantial risk that confidential factual information gained in the prior
12 representation can be used against the former client in the subsequent matter. *See*
13 Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980).
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15 Mayo and his companies have worked extensively with Dunn & Black over
16 ten years and disclosed confidential information to Dunn & Black with the
17 expectation that the information would be privileged and confidential. **Dec. of**
18 **Mayo.** This confidential information includes income statements, tax returns,
19 medical history and information, business relationships, business strategy, and other
20 strategic information that can be used against them in the current action. **Dec. of**
21 **Mayo.** Dunn & Black is therefore violating RPC 1.9 by representing Defendants
22 against Pacific Coast Fiber and Mayo in this action and should be disqualified. *See*
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IV. CONCLUSION

Based on the foregoing facts, laws, and precedents, Plaintiffs request the Court to grant their Motion to Disqualify Robert Dunn, Richard Wetmore, Alexandria Drake, and Dunn & Black, P.S. from representing Defendants in this action.

There will be no prejudice to the Defendants since they are also represented by three other lawyers in this matter.

DATED this 15th day of November, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The CM/ECF system will send notification of such filings to the following:

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